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The nation's voice for condominium, cooperative and homeowner associations

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March 2, 1998

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: In the Matter of: Telecommunications Services and Inside Wiring:
Customer Premises Equipment (CS Docket No. 95-184)/ In the Matter of:
Implementation of the Cable Television Consumer Protection and Competition
Act of 1992: Cable Home Wiring (MM Docket No. 92-260).

Dear Mr. Caton:

Pursuant to the *Second Further Notice of Proposed Rulemaking* issued October 17, 1997, in the above-captioned proceeding, the Community Associations Institute ("CAI") submits an original and nine copies of its Reply Comments.

CAI appreciates the opportunity to participate in this proceeding.

Sincerely,

Rodney D. Clark
Vice President
Government and Public Affairs

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Telecommunications Services)
Inside Wiring)

Customer Premises Equipment)

In the Matter of)

Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)

Cable Home Wiring)

CS Docket No. 95-184

MM Docket No. 92-260

Reply Comments of the Community Associations Institute

SUMMARY

Pursuant to the *Second Further Notice of Proposed Rulemaking* ("Second Further Notice") issued October 17, 1997, in the above-captioned proceeding, the Community Associations Institute ("CAI") submits the following Reply Comments.

In these Reply Comments, CAI reiterates its support for the expansion of competitive video service in the multiple dwelling unit ("MDU") and entire community association marketplace.

CAI does not believe that limiting the option to execute an exclusive contract or capping exclusive contracts as the FCC has proposed in its *Second Further Notice* will advance competition. Rather, exclusive contracts regularly facilitate the delivery of services to those who

may not otherwise receive them. Limiting such an option or requiring a uniform cap could very well prevent the delivery of quality, affordable video services in some circumstances. The FCC should remain mindful that restricting future contracts could actually retard the growth of competition among video service providers. CAI also encourages the FCC to negate all existing state mandatory access/forced entry laws and prohibit the adoption of such statutes in the future. Finally, CAI urges the application of the FCC's inside wiring rules to all MVPDs and additional examination of the technical and legal feasibility of simultaneous use of inside wiring.

I. Community Associations Play An Important, Effective And Appropriate Role In The Delivery Of Quality, Affordable Video Services.

As a preliminary matter, it is necessary to once again explain the nature, organization and governance of community associations.¹ Many Commenters have asserted that community associations, as MDU owners, seek to limit competitive choices for their residents.² Unfortunately, these arguments reflect several misperceptions about community associations.

As CAI has stated in Comments in this and other proceedings,³ community associations are governed by their residents who, through an elected board of directors comprised of owners,⁴ oversee association operations and the use of common property. In other words, community

¹ In this proceeding, "community association" means all types of common interest communities, whether condominiums, cooperatives, or planned communities. As explained below, CAI urges the FCC to extend its rulings to encompass all types of community associations in its inside wiring rules.

² Winstar Comments, at 6, 7.

³ See, CAI Comments submitted December 23, 1997, in this proceeding at 5. See also CAI's Comments and Reply Comments in the consolidated proceeding of *In the Matter of: Preemption of Local Zoning Regulations of Satellite Earth Stations: IB Docket No. 95-59; In the Matter of: Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Services: CS Docket No. 96-83.*

⁴ In different types of community associations, the person who has an ownership interest in the association is labeled differently. In a condominium, this person is a unit owner. In a cooperative, a resident, and in a homeowners

associations are run *by residents on behalf of* residents, and boards of directors must be particularly sensitive to the needs and demands of the individuals within their communities. Otherwise, they will be voted out of office.

Community association boards, like other MDU owners, have an incentive to permit multiple MVPDs onto their property⁵ and, increasingly, community associations are seeking to facilitate the delivery of a variety of competitive cable, satellite and telecommunications providers to residents of condominiums, cooperatives and planned communities throughout the United States.

Individuals choose to purchase homes in community associations subject to the covenants, rules and regulations that enable all residents to participate in the governance of the community and establish high levels of services and standards for all. As CAI has stressed before, the FCC must recognize this self-determinate process and the role community associations play in maintaining, protecting and preserving the common areas, the value of the community or building and all individually owned property within the development. To fulfill these duties, community associations must be able to control, manage and otherwise protect their common property – regardless of whether they are negotiating with a trash service, landscape architect, roofer or video provider. The FCC should resist any proposal that seeks to weaken the ability of community associations to carry out these important and necessary functions.

association, a homeowner. In these Reply Comments, “owner” will mean unit owner, cooperative resident, or homeowner. A “resident” will mean any person residing in a community association, whether an owner or a tenant.
⁵ See, Independent Cable and Telecommunications Association (“ICTA”), 8; Joint Commenters, 4 n.3.

II. The FCC Should Not Limit Exclusive Service Contracts.

In the *Second Further Notice*, the FCC proposed limiting exclusive service contracts between MDU owners and MVPDs. CAI does not believe that such an approach will advance the competitive marketplace.

Exclusive contracts regularly facilitate the delivery of services since many MVPDs will not install wiring unless they have an exclusivity period to recoup their infrastructure investment.⁶

In competitive markets, homeowners may actually receive additional benefits from an exclusive contract because providers would need to compete vigorously to secure such an agreement. The exclusive contract as a tool to deliver favorable services and prices to residents should not be restricted by limiting the terms of such agreements.

The FCC should also refrain from acting in this area since the expansion of choice among MVPD providers will naturally discourage the promulgation of anti-competitive exclusive contracts. While, historically, the option available to community associations has been to receive service on the provider's terms or receive no service at all, a true choice of providers and services dictates that community associations and other MDU owners may demand more flexible or shorter contracts than typically allowed in a monopolistic arena. A more competition marketplace will ensure that a provider who refuses to genuinely negotiate service contracts will be replaced with another who will. Such an environment will encourage additional

⁶ See, GTE Comments, 2, 7; ICTA Comments, 4, 7; Joint Commenters Comments, 2; OpTel Comments, 5; TCI Comments, 21-22; Wireless Cable Association ("WCA") Comments, 5-7

accountability from providers to deliver higher quality and more affordable services to consumers. The FCC should leave these issues to the marketplace.

III. The FCC Should Not Place A Cap On The Duration Of Exclusive Contracts.

In the *Second Further Notice*, the FCC proposed a seven year cap on the duration of exclusive service contracts.⁷ Many Commenters have argued that caps of varying durations (three⁸, five⁹, or fifteen¹⁰ years) should be adopted. However, no cap should be imposed.

The time period for a provider to recoup its infrastructure investment costs for wiring a property will vary from association to association and from region to region.¹¹ In some associations, there are substantive installation costs, while the number of potential subscribers is small. In such situations, MVPDs may be required to seek longer contracts than in cases where the subscriber base is larger. Under a uniform cap, providers would likely refuse to serve some associations because the cap would not allow adequate cost recovery.¹² If a cap is set to limit exclusive contracts when competition enters the local market, then the FCC will be involved in time-consuming determinations¹³ and arbitration, such as the process outlined in Comments by the

⁷ *Second Further Notice*, paragraph 259.

⁸ MCI Comments, 2.

⁹ Cable Operators Comments 4; Cox Communications Comments, 2, 10; Media Access Project, 5; RCN Comments, 3. The Cable Operators and Cox Communications qualify their cap proposal by suggesting that it exist only for future contracts.

¹⁰ ICTA Comments, 10 (if a cap is absolutely necessary); OpTel, 6.

¹¹ *See*, Joint Commenters Comments, 7; Time Warner Cable Comments, 13, WCA Comments, 9.

¹² *See*, WCA Comments, 10.

¹³ Ameritech Comments, 7.

Cable Operators.¹⁴ In addition, community associations will be deterred from exploring competitive options due to the uncertainties involved in any arbitration process. As competition develops, the FCC's concerns will be addressed as community associations and others seek more flexible and more limited service contracts.

IV. Section 207 of the Telecommunications Act of 1996 Does Not Grant The FCC Authority to Preempt Exclusive Service Contracts.

DirecTV has asserted that Section 207 of the Telecommunications Act of 1996 provides the FCC with the express authority to prohibit exclusive contracts.¹⁵ However, Section 207 provides no such authority. Section 207 permits the FCC to preempt "restrictions" impairing the ability to receive direct broadcast satellite ("DBS"), television broadcast, or multichannel multipoint distribution service ("MMDS") video programming signals.¹⁶ The legislative history of Section 207 reads as follows:

The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners association rules, shall be unenforceable to the extent contrary to this section.¹⁷

Contracts were not included within the purview of Section 207 and the FCC cannot rely on Section 207 as a basis to restrict exclusive contracts.

¹⁴ See, Cable Operators Comments, 5-9.

¹⁵ DirecTV Comments, 8.

¹⁶ Section 207.

¹⁷ House Committee Report, H. Rep. 104-204, at 124.

V. The FCC Should Preempt State Mandatory Access/Forced Entry Laws.

CAI encourages the FCC to negate all existing state mandatory access/forced entry laws and prohibit the adoption of such statutes in the future. As other Commenters state, such statutes limit MVPD competition and favor incumbent providers.¹⁸ Mandatory access statutes grant rights of entry based simply on what provider gets to a property first and not on negotiated contracts that examine the quality, pricing or demand for a provider's service.

Some Commenters have asked the FCC to limit exclusive contracts only in mandatory access states, asserting that only the franchised MVPD is able to obtain these contracts.¹⁹ The appropriate approach to increasing competitive choice among providers, however, is not to limit contract rights but to eliminate mandatory access statutes entirely. Absent the artificial circumstances created in mandatory access states, providers must actually compete with one another based on the quality, price and demand for their services.

The FCC should not limit exclusive contracts in mandatory access states. Rather, the FCC should recognize that mandatory access laws inhibit competition, violate property rights and hinder consumer choice. Such laws should be removed.

Mandatory access laws should certainly not be expanded at the federal level as some Commenters have urged.²⁰ As CAI stated in earlier Comments, requiring community associations to permit

¹⁸ *Second Further Notice*, paragraph 262; ICTA Comments, 11; Media Access Project Comments, 8.

¹⁹ ICTA Comments, 3, 11; RCN Comments, 8; Time Warner Cable Comments, 11-12.

²⁰ US West Comments, 6; Winstar Comments, 8.

access to any MVPD would constitute the “permanent physical occupation” of real property prohibited by Loretto v. Manhattan Teleprompter.²¹ The FCC cannot mandate such a taking, since, as held in Bell Atlantic v. FCC, any takings authority must be expressly conferred by Congress.²² There is no statutory provision in the Communications Act, the Cable Television Consumer Protection and Competition Act of 1992 or the Telecommunications Act of 1996, which grants the FCC such authority. The FCC may not deprive community associations of their fundamental property right, as recognized in Loretto, to exclude MVPDs from their property.²³

VI. The FCC Should Extend Its Inside Wiring Rules To All MVPDs.

The FCC requested Comments on whether its inside wiring rules should be extended to cover all MVPDs. Extension of these rules will provide more certainty in the marketplace by establishing a uniform approach to the disposition of inside wiring.²⁴ CAI supports the application of the FCC’s inside wiring rules to all MVPDs.

VII. The FCC Should Examine And Encourage The Simultaneous Use Of Inside Wiring.

CAI urges additional examination of the technical and legal feasibility of simultaneous use of inside wiring. While several Commenters raised potential constitutional and technological barriers to such use, it seems worthwhile for the FCC to explore the matter further.²⁵

²¹ 458 U.S. 419, at 425.

²² 24 F.3d 1441, at 1447.

²³ 458 U.S. 419, at 435.

²⁴ Ameritech Comments, 12; MCI Comments, 2; RCN Comments, 18; US West Comments, 3, 7.

²⁵ See, Cable Operators Comments, 11; ICTA Comments 17; Joint Commenters Comments, 8; NCTA Comments, 8-12; Time Warner Cable Comments, 20-21

Simultaneous use of inside wiring would help minimize damage to common property,²⁶ while potentially expanding the delivery of services from multiple providers. For some associations and providers, the simultaneous use of wiring will remove many of the challenges of installing new wiring in filled conduits and moldings. Such arrangements could also enable greater choices and better prices because of the decreased infrastructure costs of duplicative wiring.

CAI agrees with other Commenters that the FCC should ensure that any incentives developed to promote the simultaneous use of inside wiring do not effectively create mandatory access rights or prohibitions on exclusive contracts.²⁷ Community associations must retain the right to select the MVPD(s) that serve their property regardless of whether such service may or may not be delivered over existing wiring.

CONCLUSION

In its *Second Further Notice*, the FCC has proposed several ideas for increasing competition among MVPDs. CAI applauds the FCC's attempts to promote competition in a previously monopolistic market. However, the FCC should move cautiously. Exclusive contracts provide significant pro-competitive benefits and the ability to execute them should not be limited – in mandatory access states or anywhere else. In fact, the FCC should strike an important blow for competitive choice by negating the state mandatory access statutes that currently exist. In

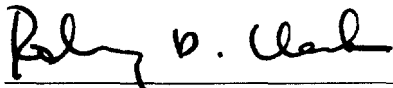
²⁶ Installing multiple sets of inside wiring necessarily involves intrusion onto common property. This intrusion often leads to damage, which the community association must repair.

²⁷ Joint Commenters, 8-9.

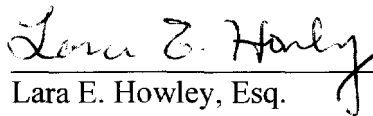
addition, the FCC should apply its inside wiring rules to all MVPDs and continue to examine the legal and technical feasibility of encouraging the simultaneous use of inside wiring.

CAI appreciates the opportunity to submit Reply Comments in this proceeding.

Respectfully submitted,



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